IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 8TH JANUARY 2007 / 18TH PAUSHA 1928

WP(C).No. 31746 of 2004(D)

AGAINST THE ORDER IN EP.363/01 IN
OS.164/2001 of MUNSIFF COURT, THALASSERY

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PETITIONER:

E.P.ABDUL LATHEEF, S/O.MUHAMMD,
45 YEARS, E.P.PLYWOOD, CHAKKARAKKAL POST,
MOVANCHERRY, KANNUR DISTRICT.

BY ADV. SRI.B.KRISHNAN
SRI.R.PARTHASARATHY
SMT.SEEMA PARTHASARATHY

RESPONDENTS:

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1. K.VINODAN, S/O.LATE APPU NAIR,
36 YEARS, KANNOTH HOUSE, ANJARAKKANDY AMSOM,
MAMBA DESOM, POST MAMBA, KANNUR DISTRICT.

2. P.K.RAJAN, S/O.KRISHNAN,
51 YEARS, PANAGATTU HOUSE,
MUKKANNUR, POST ANGAMALI.

BY ADV. SRI.K.V.SOHAN FOR R1

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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W.P.(C) NO.31746 OF 2004

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Dated this the 8th day of January 2007

JUDGMENT

A decree holder was permitted to bid the attached property in court auction sale and to set off the purchase money towards the amount due under the decree as provided under Rule 72 of Order XXI of Code of Civil Procedure. Is the executing court competent to pass order for rateable distribution as provided under section 73 of the Code in an application filed by another decree holder is the question to be settled.

2. Petitioner is the decree holder in O.S.164/01. First respondent is the decree holder in O.S.258/01. Petitioner obtained an order of attachment before judgment of the property sold in E.P.363/01 as per order dated 14.8.01. Respondent in his suit obtained an order of attachment before judgment on 13.8.01. Respondent filed E.P.86/04, for realisation of the decree debt in O.S.258/01.

Petitioner sought sale of the attached property in that E.P.363/01. The property of judgment debtor was sold in that E.P. Petitioner was permitted to bid and set off as provided under Rule 72 of Order XX1 by the executing court. The property was purchased by petitioner as auction purchaser for Rs.75,000/-. It was not sufficient to satisfy the decree debt in O.S.164/01. Respondent filed E.A.163/04 in E.P.363/01 for rateable distribution of the assets realised by the sale of the attached property in E.P.363/01. E.A.163/04 was allowed overruling the objection raised by the petitioner. Executing court directed petitioner to deposit Rs.30,000/- out of purchase money for rateable distribution to first respondent. This petition is filed under Article 227 of Constitution of India challenging that order.

3. Learned counsel appearing for petitioner and first respondent were heard.

4. The arguments of learned counsel appearing for petitioner relying on the decision of a learned

single Judge of High Court of Madras in **Periaswami Gounder v. Nachimuthu Mudaliar (AIR 1979 Madras 87)** was that executing court permitted petitioner to bid and set off and the amount realised by sale of the attached property has already been adjusted towards the decree debt and so a portion of that amount cannot be directed to be deposited for rateable distribution to first respondent and therefore Ext.P6 order is to be quashed. Learned counsel vehemently argued that first respondent had attached, apart from the property sold in E.P.363/01, another item of property belonging to the judgment debtor and he is entitled to realise his decree debt by sale of that property and only if by such sale the decree debt is not satisfied, first respondent is entitled to claim rateable distribution and therefore Ext.P6 order is not sustainable. Finally it was argued that in any case, without considering the actual entitlement, executing court directed the petitioner to deposit Rs.30,000/- and it is

illegal.

5. Learned counsel appearing for first respondent argued that set off allowed in favour of petitioner was subject to Section 73 of Code of Civil Procedure providing rateable distribution and this aspect was not taken note of in **Periaswami Gounder's case.** Relying on the Full Bench decision of High Court of Bombay in **Ramachandra Yeshwant Shringarpure v. Digambar Tejiram Pardeshi (AIR 1960 Bombay 230)** it was argued that the right of set off granted in favour of petitioner was subject to the right of first respondent for rateable distribution as provided under section 73 of the Code and first respondent had filed an execution petition before the sale and also filed an application before the executing court for rateable distribution and it was rightly allowed and there is no reason to interfere with that order. It was also pointed out that if the amount directed to be deposited by the order was

without considering the guidelines provided under section 73, executing court may be directed to fix the actual amount, which petitioner is liable to be deposited for rateable distribution, as provided under section 73 of the Code.

6. The property sold in E.P.363/01 was admittedly attached by first respondent in O.S.258/01 before the petitioner got attached the same in O.S.164/01. But the property was sold for realisation of the decree debt in O.S.164/01 by the petitioner. But before the sale, first respondent had filed E.P.86/04. Therefore first respondent is entitled to apply for rateable distribution of the assets realised on court sale as provided under section 73. The fact that petitioner was permitted to bid and set off as provided under section 72, on 27.5.04 was not disputed. The crucial question is whether by such permission petitioner is entitled to contend that as he was permitted to set off the purchase money towards the decree debt he is not liable to deposit any portion of that purchase

money for rateable distribution.

7. Sub rule (1) of Rule 72 of Order XXI provides that no holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property. Sub rule (2) provides for set off. It reads:-

> "Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of Section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

Sub rule (2) makes it absolutely clear that the permission granted to the decree holder to purchase

the attached property sold in execution and set off is subject to the provisions of Section 73. Therefore by the permission granted to bid and set off under sub rule (2) of Rule 72, a decree holder is not entitled to contend that he is not liable to deposit any part of the purchase money because of the permission granted under Rule 72. Permission granted under sub rule (2) of Rule 72 is subject to the provision for rateable distribution under section 73.

8. Learned single Judge of High Court of Madras in **Periaswami Gounder's case (supra)** did not consider the effect of sub rule (2) of Rule 72 of the Code and without taking note of the fact that permission granted was subject to the right of rateable distribution available to other decree holders under section 73, held that by the permission granted to bid and set off the purchase money shall be deemed to have been received and realised eo instanti of the sale made and therefore the sale proceeds is not available for rateable

distribution. The learned single Judge relied on an earlier decision of Division Bench of the Madras High Court in **Punnamchand Chatraban v. Vijjapu Satyanandam (AIR 1933 Madras 804)** but did not take notice that another Division Bench of the Madras High Court had considered this question in **Megraj Iswardas v. Corporation of Madras (AIR 1936 Madras 797).** The latter Division Bench took the view that, the fact that decree holder purchased the property with the leave of the court and was allowed to set off the purchase price against the decree debt , does not oust the power conferred by S.63 on the Court of the higher grade, to call for the proceeds and rateably distribute the sale proceeds. It was held that the purchase by the decree holder does not confer upon him an unqualified right, but it is subject to the terms of Section 63.

9. The Full Bench of the High Court of Bombay in **Ramachandra Yeshwant Shringarpure's case (supra),** considered the question whether the order granting

permission to set off under Rule 72 is a proceeding within the meaning of Section 63(2) of Code of Civil Procedure. Agreeing with the view taken by the Madras High Court in **Megraj Iswardas case(supra)** and holding that the permission granted under sub rule (2) of Rule 72 is subject to the provisions of Section 73, Full Bench held that by the permission granted to the decree holder to bid and set off he is not entitled to contend that any part of the sale proceeds is not liable to be deposited by him for rateable distribution. The Full Bench also held:-

> "In our judgment, sub-s.(2)of S.63 does not in any way affect the liability cast upon the decree-holder who is allowed a set off under sub rule (2) of Rule 72, to refund or pay back the amount, if it is required for rateable

> distribution, under S.73 of the Code. The object of S.63 clearly is to avoid multiplicity of proceedings and to ensure equitable distribution of the assets of a judgment-debtor which have been realised, amongst all his creditors. It does not lay down any principle of exclusion."

As pointed out by the learned counsel appearing for respondents, in view of the divergent views expressed by High Court of Calcutta, explanation was added to Section 63. The explanation reads:-

> "Explanation- For the purposes of sub-section (2), proceeding taken by a Court does not include an order allowing, to a decree holder, who has purchased property at a sale held in execution of a decree, set off to the extent of the

purchase price payable by him."

Because of the said explanation, it is clear that an order granted under Rule 72 is taken out of the purview of Section 63 of the Code. Even otherwise, when Rule 72 (2) of Order XXI specifically provide that permission granted under the section is subject to the provisions of Section 73, it is not possible to take a view that because of the permission so granted the auction purchaser decree holder is not liable to deposit any part of the sale proceeds for rateable distribution to the other decree holders, if another decree holder is entitled to rateable distribution as provided under section 73. Therefore I find no reason to interfere with the finding of the executing court that petitioner is liable to deposit part of the sale proceeds for rateable distribution to first respondent.

10. There is force in the argument of the learned counsel appearing for petitioner that

while directing to deposit Rs.30,000/- executing court did not consider the guidelines provided under section 73 and without considering that question and without giving any reason Rs.30,000/- was directed to be deposited. Finding of the executing court to that extent is set aside. Executing court is directed to fix the amount to be deposited by petitioner for rateable distribution after hearing both the parties. It was also argued by learned counsel appearing for petitioner that first respondent had attached one more item of properties in addition to the property sold in execution by the petitioner and first respondent can proceed against that property and so he is not entitled to seek rateable distribution. Learned counsel appearing for the first respondent submitted that the said property is not sufficient to satisfy the decree debts and Section 73 does not provide that if any other property is available for the decree holder, who attached the property which was sold in execution

petition, then he is not entitled to apply for rateable distribution. Section 73 does not also provide that a decree holder is entitled to apply for rateable distribution only if the judgment debtor is not left with any other property, except the property sold. So long as first respondent is a decree holder, whose decree remains unsatisfied and he had filed an execution petition for realisation of the decree debt before sale of the property, and applies for rateable distribution, he is entitled to rateable distribution. Therefore on that ground also, the order cannot be interfered.

Writ Petition is disposed of directing Munsiff, Thalassery to fix the amount to be deposited by the decree holder, for rateable distribution after hearing both the parties. It is made clear that both the decree holders are entitled to proceed against any other property of the judgment debtor, if available for realisation of the balance decree debt. Naturally decree

holders are entitled to rateable distribution in respect of that sale also, if other conditions are satisfied.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006